Anthony Lawrence Bourke & Anor v CIMB Bank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-(NCC)(W)-1345–07 OF 2016
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
17 MAY 2017

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Banking — Banks and banking business — Negligence — Allegation that bank failed to pay progressive payment to developer — Invoice issued by developer — Sale and purchase agreement terminated following bank's failure to make progressive payment — Claim for damages against bank — Whether bank must pay as invoice issues after drawdown expiry date — Whether bank waived contractual right to make payments based on earlier payments after drawdown expiry date

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The appellants entered into a sale and purchase agreement ('SPA') with a developer to purchase a property. The appellants successfully obtained a term loan facility of RM715,487 from the respondent. The property purchased under the SPA was under development and payment was to be made progressively against the certificate of completion issued by the architect at each progress billing. Under the loan agreement the respondent was obligated to make direct payment on a progressive basis to the developer on behalf of the appellants whenever such sums become due for payment. However, the respondent failed to pay the progressive claim to the developer after the issuance of notice ('invoice') for progressive payment by the developer. The developer then terminated the SPA. Premised on a breach of agreement and/or negligence in observing the duty of care and/or fiduciary duties by the respondent, the appellants filed a claim against the respondent seeking for damages suffered due to the termination of the SPA. The respondent pleaded that the invoice issued had exceeded the drawdown expiry date ('DED') in accordance with cl 1.1 of the loan agreement. The respondent argued that pursuant to cl 3.4 of the loan agreement, the respondent was under no obligation to pay the invoice issued after the DED. The appellants, on the other hand, submitted that the respondent had waived its contractual right under cl 3.4 by its conduct, namely vide four earlier disbursements made by the respondent after the DED. The High Court ('the HC'), however, did not find waiver by the respondent's conduct on the basis that the appellants had failed to prove that the respondent had intentionally waived its right under cl 3.4. Further, the HC found that since the respondent had no knowledge of the DED, there could be no intention of waiving cl 3.4. The HC went on to dismiss the appellants claim on point of law. Essentially, the appellants' claim was not dismissed for want of proving breach of contract or negligence. Instead, the appellants' claim was dismissed because the High Court found that

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A cl 12 of the loan agreement absolved any liability or claim against the respondent. Hence, the present appeal.

Held, allowing appeal with costs:

B (1) The loan agreement clearly stipulated the contractual obligation on the respondent to disburse the loan by paying the invoice issued by the developer. This clear stipulation was spelled out in the loan agreement under the clause titled 'DISBURSEMENT'. The clause imposed an explicit obligation on the respondent to pay directly to the developer the C sums due under the SPA upon the certification by the architect of the necessary progress of completion. The respondent had breached its main obligation when it failed on its undertaking to pay the invoice issued. Such a breach was a breach of the most fundamental term of the loan agreement, which went to the root of the contract (see paras 13–14 & D 41).

(2) The HC erred in finding that the respondent had no knowledge or intention to waive cl 3.4 by relying on the oral evidence of witnesses of the respondent. The HC had failed to give due consideration that the witnesses were the very people responsible and were probably in charge of E the loan agreement's account in this case. The respondent must and ought to be aware of the clauses of the agreement which in this case, the loan documents were the banks' own documents (see paras 21–22).

(3) The respondent could not plead ignorance of its legal obligations under F the contract. Their plea of ignorance having no knowledge of when the DED expired and hence they were not aware that the four disbursements were made after DED was unacceptable of the bank officers in charge of loan disbursement. The HC erred in placing reliance on the testimony of the respondent's witnesses to conclude that the respondent did not know G what it was doing and therefore did not intend to waive its contractual right under cl 3.4. Knowledge of the clauses of the loan agreement must be inferred on the respondent. The respondent's action of issuing four disbursements after the DED must show that the respondent had waived its contractual rights under cl 3.4, as it could not also say by that conduct H of disbursing after DED, it was not aware of the law on waiver. Ignorance of the law could not be a defence. Such incautious attitude of feigning ignorance by the employees of the respondent was negligent in itself. Therefore, the reliance by the respondent on cl 3.4 was devoid of any merit (see paras 23–24, 26 & 32).

I (4) The respondent was in breach of the fundamental term of the loan agreement in failing to pay the invoice in accordance to its terms. The respondent had breached its duty of care to the appellants as its customer in the handling of the loan disbursement which had directly caused the termination of the SPA causing the appellants to suffer loss and damage.

Further, cl 12 in effect was a clause that absolutely restrained legal proceedings and was void under s 29 of the Act (see para 57).

[Bahasa Malaysia summary

Perayu memasuki satu perjanjian jual beli ('PJB') dengan pemaju untuk membeli sebuah hartanah. Untuk membiayai pembelian hartanah tersebut, perayu berjaya mendapat kemudahan pinjaman berjangka sebanyak RM715,487 daripada responden. Hartanah yang dibeli bawah PJB berada dalam proses pembangunan dan pembayaran dikehendaki dibuat secara progresif terhadap sijil penyelesaian yang dikeluarkan oleh arkitek di setiap peringkat bil progresif. Bank responden diwajibkan melakukan pembayaran langsung secara progresif kepada pemaju bagi pihak perayu apabila jumlah tersebut terakru untuk pembayaran. Walau bagaimanapun, responden gagal membayar tuntutan progresif kepada pemaju selepas pengeluaran notis ('invois') untuk bayaran progresif yang dikeluarkan oleh pemaju. Pemaju kemudian menamatkan PJB tersebut. Berasaskan pelanggaran perjanjian dan/atau kecuaian kewajipan berjaga-jaga dan/atau kewajipan fidusiari oleh responden, perayu memulakan tindakan terhadap responden menuntut ganti rugi yang dialami akibat penamatan PJB tersebut. Responden memplidkan bahawa invois yang dikeluarkan melampaui tarikh luput pengeluaran ('DED') mengikut klausa 1.1 perjanjian pinjaman. Oleh itu, responden menghujahkan bahawa menurut klausa 3.4 perjanjian pinjaman, responden tidak mempunyai obligasi membayar invois yang dikeluarkan selepas DED. Sebaliknya, perayu pula menghujahkan responden telah mengetepikan hak kontraknya bawah klausa 3.4 oleh tindakannya, iaitu melalui empat pengeluaran terdahulu yang dibuat oleh responden selepas DED. Walau bagaimanapun, Mahkamah Tinggi tidak membuat dapatan bahawa terdapat pengetepian hak oleh tindakan responden atas alasan perayu gagal membuktikan responden berniat mengetepikan haknya bawah klausa 3.4. Selanjutnya, Mahkamah Tinggi mendapati bahawa oleh kerana responden tidak tahu tentang DED, tidak mungkin wujud niat untuk mengetepikan klausa 3.4. Oleh itu, Mahkamah Tinggi menolak tuntutan perayu atas persoalan undang-undang. Pada asasnya, tuntutan perayu tidak ditolak kerana perayu gagal membuktikan kemungkiran kontrak atau kecuaian. Sebaliknya, tuntutan perayu ditolak kerana Mahkamah Tinggi mendapati klausa 12 perjanjian pinjaman mengecualikan apa-apa liabiliti atau tuntutan terhadap responden. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perjanjian pinjaman jelas menyatakan kewajipan kontraktual responden untuk mengeluarkan pinjaman dengan membayar invois yang dikeluarkan oleh pemaju. Peruntukan jelas ini dipaparkan dalam perjanjian pinjaman bawah klausa bertajuk 'DISBURSEMENT'. Klausa ini mengenakan kewajipan eksplisit kepada responden untuk membayar secara langsung kepada pemaju jumlah yang harus dibayar bawah PJB

atas pensijilan oleh arkitek mengenai progres penyiapan. Responden memungkiri kewajipan utamanya di bawah perjanjian pinjaman apabila gagal memenuhi syarat untuk membayar invois yang dikeluarkan. Kemungkiran sedemikian adalah kemungkiran syarat asas perjanjian pinjaman yang menyentuhi akar umbi kontrak (lihat perenggan 13–14 & 41).

(2) Mahkamah Tinggi terkhilaf apabila mendapati responden tidak mempunyai pengetahuan atau niat untuk mengetepikan klausa 3.4 dengan bergantung pada keterangan lisan saksi responden. Mahkamah Tinggi gagal memberi pertimbangan wajar bahawa saksi-saksi tersebut adalah orang yang bertanggungjawab dan mungkin menguruskan akaun perjanjian pinjaman dalam kes ini. Responden mestilah dan harus menyedari klausa perjanjian yang dalam kes ini adalah dokumen pinjaman yang merupakan dokumen bank sendiri (lihat perenggan 21–22).

(3) Bank responden tidak boleh memplidkan kejahilan mengenai kewajipan undang-undangnya bawah kontrak. Plid kejahilan mengenai tempoh tamat DED dan oleh itu tidak menyedari bahawa empat pengeluaran telah dibuat selepas DED adalah tidak dapat diterima oleh pegawai bank yang bertanggungjawab untuk pembayaran pinjaman. Mahkamah Tinggi terkhilaf dalam bersandar pada keterangan saksi-saksi responden untuk membuat dapatan bahawa responden tidak tahu apa yang dilakukannya dan oleh itu tidak berniat untuk mengetepikan hak kontraktualnya di bawah klausa 3.4. Pengetahuan mengenai klausa perjanjian pinjaman harus diandaikan terhadap responden. Tindakan responden mengeluarkan empat pengeluaran selepas DED harus menunjukkan bahawa responden telah mengetepikan hak kontraknya di bawah klausa 3.4, kerana responden juga tidak boleh mengatakan bahawa dengan melakukan pembayaran selepas DED, responden tidak menyedari akan undang-undang mengenai pengabaian. Kejahilan undang-undang tidak boleh menjadi pembelaan. Kelakuan menyatakan kejahilan oleh pekerja responden adalah kecuaian. Oleh itu, sandaran oleh responden pada klausa 3.4 tidak mempunyai apa-apa merit (lihat perenggan 23–24, 26 & 32).

(4) Responden telah melanggari syarat asas perjanjian pinjaman apabila gagal membayar invois mengikut terma. Responden juga melangari tanggungjawab kewajipan berjaga-jaga terhadap perayu sebagai pelanggannya dalam mengendalikan pembayaran pinjaman yang secara langsung menyebabkan penamatan PJB mengakibatkan perayu mengalami kerugian dan kerosakan. Selanjutnya, klausa 12 adalah klausa yang menghalang prosiding undang-undang dan ini tidak sah di bawah s 29 Akta (lihat perenggan 57).]

Notes

For cases on banks and banking business in general, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2690–2926.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
CIMB Bank Bhd v Maybank Trustees Berhad and other appeals [2014] 3 MLJ 169, FC (refd)
Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 2 MLJ 170, SC (refd)
Malayan Banking Bhd v Hong Sek Mee & Anor [1998] MLJU 74; [1998] 4 CLJ 450, HC (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (distd)
New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 MLJ 185; [1992] 1 CLJ 44, SC (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, HL (refd)
Public Bank Bhd & Anor v Exporaya Sdn Bhd [2013] 1 MLJ 507; [2013] 2 CLJ 753, CA (refd)

Legislation referred to

Contracts Act 1950 s 29
Indian Contracts Act 1872 [IND] s 28
Limitation Act 1953

Appeal from: Civil Suit No 22NCC-218–07 of 2015 (High Court, Kuala Lumpur)

Ong Yu Jian (Jowe Ninoy Almeida with him) (Raj, Ong & Yudistra) for the appellants.
Wong Hok Mun (Sharifah Alliana Idid bt Syed Zahir Idid with him) (Azim, Tunku Farik & Wong) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is a case where the appellants' sale and purchase agreement dated 18 February 2008 ('SPA') with a developer, Crest Worldwide Resources Sdn Bhd to purchase a property was terminated, on the failure of the respondent bank as a financier to pay the progressive claim to the developer under the SPA. The learned judicial commissioner ('JC') after a full trial had dismissed the claim of the appellants against the respondent relying on an exemption clause, which was held to have exempted the respondent bank from all liabilities. The appeal by the appellants is against the dismissal of the said claim.

[2] The brief facts of this case are not much in dispute. The appellants are husband and wife. They are foreigners and living in United Kingdom. To finance the property purchase, the appellants applied for and was granted a term loan facility of RM715,487 by the respondent bank. The loan was provided under the housing/shop house loan agreement term loan dated 22 April 2008 to be read together with the application for home loan facility letter dated 24 January 2008 ('the loan agreement'). The property purchased under the SPA was under development and payment was to be made progressively against the certificate of completion issued by the architect at each progress billing. The respondent bank under the loan agreement is obligated to make direct payment on a progressive basis, to the developer on behalf of the appellants, whenever such sums become due for payment.

[3] On or about 12 March 2014, the developer sent a notice for a progressive payment to the respondent bank vide an invoice No IV000003408 which contained an architect's certificate dated 28 February 2014. The notice was received by the respondent bank on 13 March 2014. The sum due under the invoice was RM25,553.12 and the due date for payment was 25 March 2014 (due date). Eight days after receipt of the invoice, that is on 20 March 2014 the disbursement department of the respondent bank sent an email requesting its branch to conduct site visit inspection on the property. The respondent did not do anything more on the Invoice thereafter, until the expiry of its due date.

[4] Even three months after the invoice due date, there was no confirmation of any site visit inspection been conducted on the property. The respondent's disbursement department sent several internal emails dated 24 April 2014, 7 May 2014, 29 May 2014, 11 June 2014 and 25 June 2014 to its branch to conduct the site visit. However, the branch did not respond to any of these emails. Sofinaz ('DW5') an ex-employee and branch manager of the respondent bank sent an email on 30 January 2015 and mentioned in passing of an attempt at site visit inspection in 2014. However at trial DW5 could not remember; when the attempt was made; did not write or inform anyone about such attempt; and could not recollect any detail about the purported attempt in 2014. Besides DW5, no other witnesses could corroborate or show any contemporaneous document on this purported attempt in 2014.

[5] The respondent did not notify either the developer or the appellants on the need of a site visit inspection as an additional condition to disburse payment on the invoice. The respondent also had never make any request to the developer to extend the invoice due date in order for them to conduct the site visit.

[6] In the end, the respondent bank failed to make payment on the invoice by its due date of 25 March 2014. The respondent did not seek for an extension

of time to pay the invoice, nor inform the appellants that it would not be paying on the invoice. After approximately one year from its issuance date, the Invoice remained unpaid. The developer then terminated the SPA by a notice of termination dated 10 April 2015 sent to the appellants.

[7] The appellants filed a claim against the respondent bank seeking for damages suffered resulting from the termination of the SPA. The damages sought are as stated at para 21 of the amended statement of claim. The claim was premised on breach of agreement and/or negligence in observing the duty of care and/or fiduciary duties by the respondent bank to the appellants.

[8] In its defence the respondent bank pleaded firstly, that the invoice issued had exceeded the drawdown expiry date ('DED') calculated to be on or around 24 January 2011 in accordance with cl 1.1 of the loan agreement. Following that, cl 3.4 states that the respondent bank is under no obligation to pay the invoice issued after the DED. As an alternative to the above defence the respondent relied on cl 3.3(a) of the loan agreement which the respondent contended to have offered absolute discretion to the respondent bank to disburse the loan in any way it may deem fit, and to impose any necessary condition. The final defence by the respondent was to rely on the exemption clause in cl 12 which was contended to exclude the respondent's liability for any loss of income or profit or savings, direct or indirect, incidental, consequential, exemplary, punitive or special damages.

[9] The learned JC having heard the case in a full trial dismissed the claim of the appellants. In her grounds of judgment, the learned JC did not make any finding of facts as to whether or not there was a breach of contract or any negligent on the part of the respondent bank. However, the learned JC dismissed the appellants' claim on point of law. In summary the learned JC held that:

(a) in relation to the appellants' claim for breach of contract, cl 12 of the loan agreement 'is clear and unequivocal and it excludes the defendant's liability in respect of any form and any amount of loss and/or damages sought by the plaintiff and disclaims all such loss and damages ...';

(b) in relation to the appellants' claim for negligence, as cl 12 of the loan agreement 'has excluded the defendant's liability in contract, the plaintiff are barred from seeking liability based on tort as it would amount to circumventing the effect of the said Clause';

(c) in relation to the appellants' claim under the heads of agency, legitimate expectation and fiduciary duty, these three issues were not pleaded and thus, 'the plaintiff are precluded from raising this in their argument';

(d) in respect of the appellants' claim that the contractual terms were

unconscionable, 'based on the principle laid down in *Photo Production Ltd*, the plaintiff' argument on the issue of conscionable is therefore unsustainable';

(e) in respect of the issue of the drawdown expiry date ('DED') and waiver of the same, 'the evidence adduced through the defendant's witnesses collectively shows that the defendant was not aware that the DED has expired on 24 January 2011 based on cll 3.4 and 1.1 of the agreement. Since the two requirements of 'waiver' ie knowledge and intention to waive ... could not be proved, there is no effective waiver of the DED which has lapsed on 24 January 2011. Hence the defendant has no contractual obligation to pay the invoice ...' and further that 'the defendant could not be said to be negligent in not paying the Invoice and therefore it has no duty of care to do so. Where there is a contract governing the relationship between the parties, the obligations of the parties in tort cannot be wider than the expressed terms or implied terms of the contract ...';

(f) as 'Clause 3.3(a) of the agreement bestows upon the defendant the absolute right to decide when, how, in what manner and upon what condition the loan would be disbursed, the defendant has an absolute right to introduce this site visit condition before paying the Invoice ...' and 'Clause 3.3(a) does not stipulate that the defendant must give any notice or must notify the plaintiff of any condition it wishes to impose on the disbursement of the loan ...'; and

(g) the appellants failed to mitigate their losses as 'there is no shred of evidence adduced by the plaintiff to show that they have asked the developer to return the monies paid to them for the purchase price. Hence, the plaintiff cannot now claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach'.

[10] Essentially the appellants' claim was not dismissed for want of proving breach of contract or negligence. Instead, the appellants' claim was dismissed because the learned JC found cl 12 of the loan agreement operative which absolves any liability or claim against the respondent bank. Clause 12 therefore, is an absolute exemption clause which excludes liability of the respondent bank in this case both in contract and in tort and for that reason the claim of the appellants was dismissed.

[11] The learned JC despite her analysis of the facts and evidence before her, did not make any finding of fact as to whether or not the respondent bank was in breach of the loan agreement or was in breach of its duty of care under the tort of negligence to the appellants, when the invoice was not paid.

[12] Before we delve into the issue on the proper construction and application of cl 12, we found it necessary for the facts of this case to be put in a clearer perspective and to determine on the facts and evidence whether the respondent bank was first of all in breach of the loan agreement either in contract or in tort. In doing so, we would simultaneously address the issues and defences raised by the respondent in its pleaded case under cl 3.4 and its alternative defence under cl 3.3 of the loan agreement.

WHETHER THE RESPONDENT BANK WAS IN BREACH

[13] Firstly, we find it clearly stipulated in the loan agreement the contractual obligation of the respondent bank to disburse the loan by paying the invoice issued by the developer. This clear stipulation is spelled out in the loan agreement under the clause titled 'DISBURSEMENT' in the appendix to the letter of offer dated 24 January 2008 as found at p 629 of the appeal record, Vol 2(4). Clause 2 of the disbursement clause states clearly that:

> The Bank shall pay directly to the Developer or to the Financier (if applicable) through the Bank's solicitors based on the Payment Schedule in the Sale and Purchase Agreement and/or on the production of Architect's certificate of Completion.

[14] The above clause imposes an explicit obligation on the respondent bank to pay directly to the developer the sums due under the SPA upon the certification by the architect of the necessary progress of completion. It was not disputed that the respondent bank had not paid the Invoice in question.

[15] We then proceeded to consider whether cl 3.4 offers a good justification and defence to the respondent bank on the facts and circumstances of this case. It was the respondent's case that because the invoice was issued after the DED, by virtue of cl 3.4 the respondent need not disburse the loan. We noted the plain provision of cl 3.4 which states this:

> No disbursement shall be made after the Drawdown Expiry Date.

[16] The DED has been defined in cl 1.1 of the loan agreement, as 36 months from the date of the bank's letter of offer or any extended date agreed by the bank by written notice. By this calculation it was not in dispute that the DED was 24 January 2011. The invoice which was issued on 12 March 2014 was therefore beyond the DED and by virtue of cl 3.4 thereof the respondent contended that it had no further contractual obligation to disburse or pay the invoice. As this clause is clear, unequivocal and unambiguous, the respondent relied on the High Court case of *Malayan Banking Bhd v Hong Sek Mee & Anor* [1998] MLJU 74; [1998] 4 CLJ 450 to contend and urge this court to give its full effect.

[17] There was no dispute that the DED was 24 January 2011. It is plainly clear that by virtue of cl 3.4 the respondent bank was not obligated to disburse the loan after that. The appellants however, submitted that the respondent bank had waived its contractual right under cl 3.4 by its conduct. There was evidence before the trial court that there were four earlier disbursements made by the respondent bank after the DED of 24 January 2011. The four disbursements took place on 2 March 2011, 25 March 2011, 7 July 2011 and 10 February 2011 respectively. In those four occasions the respondent bank had never raised issue on DED but instead proceeded to execute the four disbursements direct to the developer in compliance with the term of the loan agreement. Such conduct, according to learned counsel for the appellants amounted to waiver and the respondent bank is excluded from relying on such a defence.

[18] The learned JC however did not find waiver by the respondent's conduct. In coming to that decision the learned JC applied the test as found in the Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. The test to be applied as enunciated in that case was that waiver would only set in if it is proven that the respondent's conduct of making the four disbursements was done with knowledge as well as with intention to waive. Applying that general principle it would only be a waiver if it can be proven that the respondent bank disbursed the four payments with knowledge that they were made after the DED, and with the intention of waiving cl 3.4.

[19] On the assessment and based on the totality of evidence before her the learned JC found the appellants had failed to prove that the respondent bank had intentionally waived its right under cl 3.4. The lack of knowledge and intention on the part of the respondent bank as found by the learned JC was on the account of the testimony of the respondent bank's witnesses. During the trial all the witnesses for the respondent testified that they were not aware or had any knowledge that DED had expired on 24 January 2011, when the four disbursements were made. Since the respondent had no knowledge of DED there would be no intention of waiving cl 3.4 as stated by the respondent's witnesses. The learned JC held therefore that in making the four disbursements, the respondent had not intentionally waived its right under cl 3.4. As such it was held that waiver had not set in against the respondent bank relying on the test formulated in *Muniandy*.

[20] We have examined the above case relied by the learned JC in arriving at her conclusion. In *Muniandy*, the facts of the case involved an ex parte order for sale obtained against the chargors. The chargors then applied for that ex parte order to be set aside. One of the issues raised by the chargee was that the chargors' application was barred by waiver. The waiver issue was in relation to

the fact that following a judicial sale by public auction to a purchaser, the chargors had, in response to a written letter by the chargee's solicitor called at the solicitor's office to collect the balance of the proceeds of sale after deduction of the usual expenses. It was held in that case that, premised on the facts as found by the Federal Court that the chargors were ignorant lay persons, unrepresented and obviously knew nothing about their legal rights, their acceptance of the balance purchase price cannot therefore be construed to have been made with the intention to waive their rights. The Federal Court further found that in any case, a nullity order in that case, cannot be waived.

[21] We agreed with the learned JC on what the statement of law on waiver in *Muniandy* is. However, in our view on the facts of the present case the learned JC had erred in her finding that the respondent bank had no knowledge or intention to waive cl 3.4 by relying on the oral evidence of witnesses of the respondent bank. As revealed in the notes of proceedings all the witnesses for the respondent bank testified in chorus before the court that all of them were not aware of the DED of the loan agreement. And some of them in fact said they had never and had no knowledge that they were issuing the four disbursements after the DED. It would be pertinent to note that the witnesses of the respondent bank DW2, DW3, DW4, and DW5 were employees holding position such as manager, team supervisor, disbursement officer in the Disbursement Department of the bank and also a branch manager.

[22] We took a diametrically opposite view on the finding of the learned JC. In our view it is a fair presumption that the respondent bank must and ought to be aware of the clauses of the agreement which in this case, and as in all cases, the loan documents are banks' own documents. By this finding the learned JC had failed to give due consideration that the witnesses were the very people responsible and were probably in charge of the loan agreement's account in this case. These witnesses would firstly were either giving self serving evidence at the risk of being negligent or prevaricating to safeguard their own situation. They should not be allowed to feign ignorance of their own responsibilities.

[23] The respondent bank cannot plead ignorance of its legal obligations under the contract. Especially so, in our observation the loan agreement herein are standard documents used by the respondent bank as evidenced from its title that says 'HOUSING/SHOPHOUSE LOAN AGREEMENT' where particulars of borrowers and other specific particulars are inserted in the appendices. The witnesses for the respondent bank were and are employees holding responsible positions. The plea of ignorance having no knowledge of when DED expired and hence they were not aware that the four disbursements were made after DED is highly undesirable and unacceptable of the bank officers in charge of loan disbursement.

A **[24]** The learned JC in our view had erred in placing reliance on the testimony of these witnesses to conclude that the respondent bank did not know what it was doing and therefore did not intend to waive its contractual right under cl 3.4. Knowledge of the clauses of the loan agreement must be inferred on the respondent bank. There is no excuse on the part of the bank to B say that it has no knowledge on its own documents. The respondent bank's action of issuing four disbursements after the DED must show that the respondent had waived its contractual rights under cl 3.4, as it cannot also say by that conduct of disbursing after DED, it was not aware of the law on waiver. Ignorance of law cannot be a defence in the first place.

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[25] Furthermore, it is highly illogical and improbable that if the responsible officers of the respondent bank were not aware of DED on all the four previous occasions, how is it that they became aware of it when the Invoice was issued. In this regard, it must be borne in mind that the respondent bank here was not D the unrepresented layman chargors like those found by the Federal Court in *Muniandy*'s case. This case is clearly distinguishable on its facts. In our view there is no possible excuse for the bank employees dealing with loan disbursements not to know what was going with the customers' account.

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[26] It would be rather distressing to any customer or borrower of a bank to note that bank employees who are charged with the duty to disburse loan are unaware of the terms of the loan agreement. This is unacceptable by any standard of banking operation. The bank being a custodian of public funds F must ensure that its employees are not only competent but are mindful of the trust placed by the public members in them. Their ignorance of the loan agreement can cause losses and damages to the borrowers or client. Such incautious attitude of feigning ignorance by the employees of the respondent bank is in our view, negligent in itself.

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[27] Furthermore, if it had been the case of the respondent bank that it was under no obligation to pay on the invoice, the respondent bank should have at least indicated it to the appellants its refusal to disburse the loan under cl 3.4. This is especially so when the respondent bank had continued to disburse the H loan after DED not once, but four times before. There is a duty on the respondent bank to do so in view of the implication of non-payment under the SPA. The SPA ought to be well within the knowledge of the respondent bank.

[28] The learned JC found the respondent bank under no obligation to I notify the appellants because no such contractual obligation was imposed under the terms of the loan agreement. We agreed with the learned JC that there is nothing spelled out in the loan agreement requiring a notice be given to the appellants. However, when the respondent bank had continued to make the four payments without any complaints the appellants cannot be expected

to imagine or to know that the respondent bank would not pay this time. If not under the loan agreement, the respondent bank being an agent of the appellants to pay the invoice owed that duty of care to at least keep the appellants informed of its legal stand, knowing the implication of it.

[29] As provided under the loan agreement, when the DED lapsed, the respondent had a choice between two courses of conduct; to either waive cl 3.4 and carry on disbursing payments, or to enforce that clause to refrain from doing so. It is evidently clear that the respondent bank had elected the former. Having made its election, the respondent bank is estopped from approbating and reprobating its legal position. Raising the DED as a justification for not paying the Invoice appears belated, an afterthought and lacking genuineness.

[30] Having made its election to waive the DED and by continuing to disburse on the Agreement, the respondent bank ought not to be allowed to take an absolutely opposite position in defence of its action. In our view this is a classic case of a waiver by conduct as decided in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. It was observed by the Federal Court through the judgment of Gopal Sri Ram JCA (as His Lordship then was) at p 348 of the judgment that when payment was made on the invoices without protest in that case, a reasonable man in similar circumstanced would be entitled to assume that the there was no complaint on the same. Similarly the appellants here would be entitled to assume that the respondent bank had waived its right under cl 3.4 of the loan agreement after DED, by its conduct. It would be most unjust for the respondent to now suggest that, after paying four invoices, it can go back to cl 3.4 to enforce its original right that it had at least on four occasions, waived.

[31] It must also be noted that the issue on DED was not pleaded by the respondent bank in its original defence to the suit. It was raised for the first time during the summary judgment proceedings. This led to the subsequent amendment of the defence by the respondent bank to rely on this clause as a defence and to justify the failure to pay the invoice.

[32] In the upshot of these discussions it is plainly clear in our view, that the respondent bank had waived its contractual right under cl 3.4 when by its own conduct of paying four more disbursements after the expiry of DED. This case falls squarely within the facts in *Boustead*. The reliance by the respondent bank on cl 3.4 is therefore, devoid of any merit.

WHETHER THE RESPONDENT CAN RELY ON CL 3.3

[33] As an alternative defence, the respondent bank contended that cl 3.3(a) is a blanket provision for the respondent bank to decide on how and on what

A condition the disbursement is to take place. There is no doubt that cl 3.3(a) is worded in a wide encompassing nature, which we produce below for better appreciation of it:

3.3 Disbursement

B (a) The Customer authorises the Bank to pay any amount in such manner and upon such terms and conditions as the Bank deems fit, to any financial institution, firm of solicitors, Developer, Vendor, Builder, Contractor, Architect or such other person responsible for or concerned with the sale of the Property or the construction of the Property, at such
C times, in such manner, in such amount, and upon such contingencies and conditions as the Bank may in its absolute discretion decide, and/or by progressive releases or otherwise in accordance with the schedule of payments or such variation as the Bank may deem fit. An acknowledgement from the recipient shall be deemed as if the same had been made or given by the Customer personally.

D

[34] Relying on this absolute discretion clause, the respondent bank said the invoice was not paid because its internal policy imposes a condition that a disbursement for a house which is above 50% completion requires a site visit.

E

[35] Looking back at cl 3.3(a) it no doubt gives the bank the discretion to disburse the loan at any time and in any manner it deems fit and upon conditions which the bank may so decide. We agreed with the learned JC that the respondent bank is endowed with full discretion on how it can disburse the
F loan under this clause. However in our view cl 3.3(a) cannot and does not permit the respondent bank to withhold the disbursement completely. We say so because the specific instances where the respondent bank may withhold disbursement of the loan are clearly and specifically addressed in cll 3.3(c) and 3.3(d). Under cl 3.3(c) the bank may withhold the loan when the customer
G authorises the bank to do so on the failure of the developer to honour its obligation, or if the bank opines that the developer is in breach of the sale and purchase agreement or any construction contract or security interest. Clause 3.3(d) allows the bank to withhold disbursement in an event of default described under cl 8.

H

[36] Withholding disbursement is viewed serious enough under the loan agreement when cl 3.3(b) does not even allow the customer to request the bank to withhold any disbursement, if the bank had given an undertaking to a third party to disburse. The imposition of new condition allowable as contemplated
I by this clause, in our view is for the purpose of disbursement, and not to withhold it.

[37] Even if cl 3.3(a) allows a condition of site visit to be imposed, and it had been so imposed, the failure to do site inspection can only be attributed to the

respondent bank. In this regard, the facts reveal that the respondent bank had not taken any step to effect a site visit before the due date of the payment of the invoice on 25 March 2014. The only step taken by the respondent bank was to email its disbursement department eight days after the receipt of the invoice. Nothing happened after that date and even after three months of the expiry of the DED no site inspection took place. All the emails sent by the respondent's disbursement department dated 24 April 2014, 07 May 2014, 29 May 2014, 11 June 2014 and 25 June 2014 to its branch to conduct site visit received no response. Sofinaz ('DW5') in her email of 30 January 2015 mentioned in passing of an attempt to conduct site visit. In her testimonies before the trial court however DW5 could not recall when any attempt was made and neither did she write to anyone about it and effectively failed to recall any detail about it.

[38] It is clear therefore that the failure to conduct site visit is due to the respondent bank's own folly. No evidence of any request been made to the developer for site visitation. The appellants were not notified of this purported condition for disbursement nor any extension of time been sought from the developer on the payment pending site visitation. The failure and the lackadaisical attitude demonstrated by the respondent bank would disentitle it from relying on this defence.

[39] The invoice pertained to the stage of 85% completion. Looking at the 'Schedule of Payment of Purchase Price' in Appendix 3 attached to the SPA, there would have been a number of other Invoice issued after the 50% completion. The respondent bank did not adduce evidence to support its contention that it had done site inspection on the earlier payment upon reaching 50% completion as contended.

[40] A duty of care and skill applies when a bank is to execute its duty to disburse a loan according to the order or for the benefit of its customer. In doing so the bank owes a duty to the customer to exercise reasonable care and skill in disbursing the loan in accordance with the terms of the loan agreement and the SPA in this case. In a situation such as this the bank is in effect an agent of the customer when it disburses the loan to pay under the SPA on behalf of the customers. This legal position was adopted by the Supreme Court in *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170. It was held by the Court of Appeal in *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507; [2013] 2 CLJ 753 that it is an implied term between a bank and a customer that the bank will employ a reasonable skill and care in the execution of customer's order. The test applicable is whether a reasonably prudent bank faced with the same circumstances would regard the steps taken by a bank justifiable.

[41] Having considered the above two defences raised in the alternative by the respondent, we are not able to agree that these two clauses offered any excuse for the respondent bank not to pay the invoice as obligated under the loan agreement. We find the respondent bank had breached its main obligation under the loan agreement when it failed to fulfil the term to pay the invoice issued directly to the respondent under the loan agreement. Such a breach in our view is a breach of the most fundamental term of the loan agreement, which goes to the root of the contract.

THE EXEMPTION CLAUSE

[42] We now come to the main reason cited by the learned JC as to why the claim of the appellants was finally dismissed. The High Court had placed the whole reliance on cl 12 in dismissing the claim of the appellants. We produce below cl 12 to better understand the full breath of its implication:

> Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed.

[43] A careful perusal of this clause will divulge that it is a clause which deals with the liability of a bank in relation to measure of damages. Thus, this clause will come into play only upon damage been founded. From its broad wording it seeks to exclude the liability of the respondent bank for any damages suffered by the borrower in the form of damages described in this clause.

[44] Learned counsel for the appellants raised three main grounds of appeal on the interpretation and construction of cl 12 by the learned JC. The three grounds raised were that cl 12 is void under s 29 of the Contracts Act 1950; it is against public policy and it is not an absolute exemption on the liability of the respondent bank.

[45] For the respondent it was contended that cl 12 is an absolute exclusion clause which excludes liability on the respondent both on primary and secondary obligations, citing the case by the Federal Court in *CIMB Bank Bhd v Maybank Trustees Berhad and other appeals* [2014] 3 MLJ 169 which was submitted to have accepted and applied the principle laid down in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556. Learned counsel for the respondent submitted the exemption clause which is clearly susceptible of one meaning only, must be enforced however unreasonable the court may think. Finally learned counsel submitted that cl 12 of the loan agreement is an

exclusion clause which excludes liability not only in respect of the respondent's primary obligation but also the general secondary obligation.

[46] We will now deal with the contention of the learned appellants' counsel that cl 12 offends s 29 of the Contracts Act 1950. Section 29 reads this:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[47] Section 29 renders a contractual clause which prohibits or restricts absolutely the right to enforce a contract by usual legal proceedings void. The emphasis here is on absolute prohibition or restriction from enforcing a legal right, even by way of limiting the time to sue under the contract. In essence looking at s 29 again it would appear that it is intended to invalidate a contract which:

(a) restricts absolutely a party from enforcing the rights to sue by usual legal proceeding; or

(b) limits the time within which a party can enforce the rights.

[48] A case in point relates to the second limb of s 29 was decided by the Supreme Court in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185; [1992] 1 CLJ 44. This is a case which limits the time for filing an action in an insurance contract under its condition 19 which states that:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of pending action or arbitration.

[49] When a claim was filed twelve months after the fire in that case, it was argued that the claim was barred by condition 19 above. This clause was held to be void by the provision of s 29 of the Contracts Act 1950. Further to that, condition 19 was also found to have the effect of depriving the party of its statutory right to bring action within six years under the Limitation Act 1953. We quote an instructive passage by LC Vohrah J (later FCJ) in the case where he said:

> ... The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land ...

[50] As we had earlier adverted to, cl 12 no doubt does not appear to restrict a claim of the appellants to file a suit either under contract or tort. However, the effect of cl 12, as has also been pointed out in the grounds of judgment of the learned JC, is a clause that effectively restricts the appellants from initiating any claim against the respondent bank for any liability or any loss and damage arising under the contract. There was no dispute between parties as to the effect and implication of cl 12. Learned respondent's counsel both in his oral and written submission agreed that,

> Clause 12 of the loan agreement is an exclusion clause which excludes liability not only in respect of the respondent's primary obligation but also general secondary obligation.

[51] Learned counsel for the respondent then cited the authority of *Photo Production Ltd v Sexuricor Transport Ltd*. The term primary and secondary obligation was used in that case in the following manner:

> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but with two exceptions, the primary obligations of both parties so far as they have not been yet fully performed remained unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the 'general secondary obligation.

[52] We have further examined closely if cl 12 is the kind of clause intended to be prohibited by s 29. It is clear from the submissions of the respondent that cl 12 despite its wordings, relates to what is referred to as secondary obligation in the *Photo Production Ltd v Sexuricor Transport Ltd*. It is obvious to us as well as to the learned counsel of the appellants, and so too the respondent, that cl 12 has the effect of excluding the liability of the respondent bank for any cause of action arising out of the loan agreement. Consequently it is a clause that negates the right of the appellants herein to a suit for damages; the kind spelled out in that clause, which encompass all form of damages under a breach of contract or under a suit of negligence.

[53] It ought to be reminded that the Supreme Court in *New Zealand Insurance Co Ltd v Ong Choon Lin* when confronted with submissions on the applicability of Indian cases on the issue of a contract clause which restraints legal proceedings under the second limb of s 29, made its observation about cases decided by Indian Court in not striking out similar clause for offending s 28 of the Indian Contracts Act 1872 (which is similar to s 29). The basis used by the Indian Court was that there is a distinction between rights on one hand and remedies on the other. The Supreme Court in *New Zealand Insurance Co Ltd* then found that there is no such distinction in the case of Malaysia. The

Supreme Court then made its observation that:

> This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this court in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] CLJ 126.

[54] In *Hock Hua Bank Bhd* it was clearly stated by the Supreme Court that a relief or a remedy is ancillary to and not separable from a cause of action. In the words of Syed Agil Barakbah SCJ at p 236, he said:

> Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the court a remedy against the defendant ... There must be a cause of action before a plaintiff can claim a relief in an action ...

[55] There is no doubt that relief is part and parcel of a cause of action. We do not think a right therefore can be disassociated with remedy. Thus cl 12 though appearing to have the effect of negating the remedy to the appellants in this case, in effect it is a cl that makes any action against the respondent futile. In the circumstances we are of the considered view that cl 12 contravenes s 29 of the Contracts Act, because in its true effect it is a clause that has effectively restrained any form of legal proceedings by the appellants against the respondent bank. It can be clearly demonstrated by the current appeal that despite our findings on the breach by the bank in this case if cl 12 is allowed to stay it would be an exercise in futility for the appellants to file any suit against the respondent bank.

[56] The learned JC did not address the application of s 29 of the Contracts Act and the above cases were not considered when she arrived at her finding that cl 12 bars the appellants' claim entirely. We were informed by learned counsel, that s 29 was not raised at the High Court but was only raised before us in this appeal. This being a question of law and the respondent did not raise objection on the same, we had then given this issue our due consideration.

[57] In conclusion, from the evidence appearing in the appeal records in this case and for all the reasons stated above, we find the respondent bank was in breach of the fundamental term of the loan agreement in failing to pay the invoice in accordance to its term. The respondent had breached its duty of care to the appellants as its customer in the handling of the loan disbursement which had directly caused the termination of the SPA causing the appellants to suffer loss and damage. We further find cl 12 in effect is a clause that absolutely restrains legal proceedings and it is void under s 29 of the Contracts Act.

[58] We unanimously therefore hold the respondent bank liable to the appellants and allowed the appeal of the appellants with costs. We set aside the order of the learned JC and make further order for damages to be assessed before the trial court.

[59] Both my learned brother Vernon Ong Lam Kiat JCA and my learned Sister Hasnah Mohammed Hashim JCA, have seen this judgment in draft and have concurred with the same.

Order accordingly.

Reported by Afiq Mohamad Noor